

ADVANCED CONSTITUTIONAL LAW:
Comparative and Remedial Issues

Volume 1

September, 2004.

Professor Kent Roach
Faculty of Law, University of Toronto.

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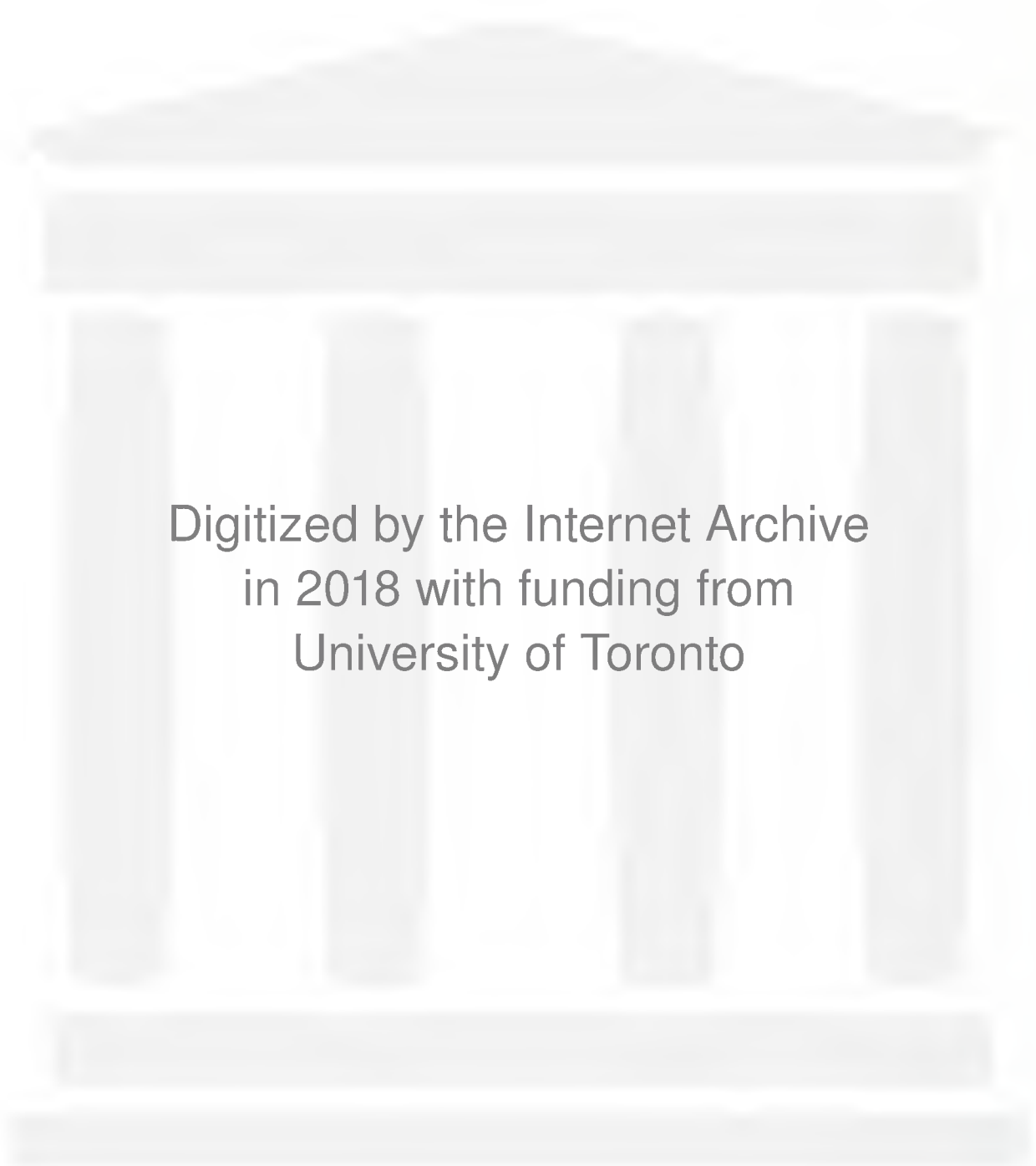
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Advanced Constitutional Law: Comparative and Remedial Issues

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Course Description:

This course will examine judicial review under bills of rights as a form of dialogue between the independent courts, legislatures and the larger society. We will examine dialogue not only the Canadian Charter of Rights and Freedoms but under a number of other constitutions including the United States, the United Kingdom, New Zealand, and South Africa. We will explore whether the possibility of dialogue in the form of legislative revision or reject of court decisions under bills of rights adequately responds to a variety of concerns about judicial review. We will also focus on comparative cases that relate to the respective roles of courts and legislatures and in particular remedial decisions of the courts which implicate the respective roles.

The second half of the course will examine dialogic understandings of judicial review in the crucible of some of the most difficult decisions that courts make under a bill of rights: the provision of remedies for constitutional violation. We will examine a variety of remedies available for unconstitutional legislation and for constitutional violations by the executive. Topics examined will include the range of remedies available for unconstitutional legislation including delayed or suspended declarations of invalidity and reading in. We will also examine the use of declarations and injunctions as a means to ensure that governments comply with the constitution.

Course Requirements:

The course requirement is a 25 page research paper on a topic related to the broad concerns of the course or the equivalent amount of pages of critical and analytical commentary on the course materials and discussions. You may focus on a particular aspect of the course for the comment papers but are expected to deal with both the concepts of dialogue and remedies in the two to three papers which are due on the final day for submission of papers. There is more flexibility with respect to the research papers. They may deal with any aspect of the dialogue debate, any remedial issues confronting the courts or any suitable topic of comparative constitutional law that may include countries not studied in class. For example, it would be interesting to examine the concept of dialogue with respect to countries such as that have a limited form of democracy or with respect to common law countries without a bill of rights such as Australia.

Course Outline and Readings (Subject to Change)

- 1) September 13: Introduction to Dialogic Constitutionalism
Casebook Vol. 1 pp. 1-49
- 2) September 20: Dialogue Between Courts and Legislatures in the United States
Casebook Vol. 1 pp. 50-75
- 3) September 20: Dialogue Between Courts and Legislatures in Canada
Casebook Vol. 1 pp. 76-115
- 5) September 27: Dialogue Between Courts and Legislatures in the UK and New Zealand
Casebook Vol. 1 pp. 116-147
- 6) October 4: Dialogue Between Courts and Legislatures in South Africa and Conclusion on Dialogic Constitutionalism
Casebook Vol.1 pp. 148-204
- 7) October 18 : Introduction to Constitutional Remedies
Casebook Vol. 2 pp. 1-80
- 8) October 25: Remedies in the Criminal Process
Casebook Vol. 2 pp. 80-245
- 9) November 8: Damages and Costs
Casebook Vol. 2 pp. 246-334
- 10) November 15: Declarations and Injunctions
Casebook Vol. 2 pp. 335-442
- 11) November 22: Remedies for Unconstitutional Legislation I
Casebook Vol. 2 pp. 443-481
- 12) November 29: Remedies for Unconstitutional Legislation II
Casebook Vol. 2 pp. 481-577

1. Introduction to Dialogic Constitutionalism

Alexander Bickel <i>The Least Dangerous Branch</i> 2 nd ed (1985)	1-10
Michael Perry <i>The Constitution in the Courts</i> (1994)	11-17
Kent Roach <i>The Supreme Court on Trial</i> (2001)	18-31
Kent Roach "Constitutional and Common Law Dialogues 482-509 (2001) 80 Can. Bar Rev. 481	32-59
Aharon Barak "A Judge on Judging the Role of the Supreme Court in a Democracy 84-89 (2002) 116 Harv. L.Rev. 16	
Mark Tushnet "Judicial Review of Legislation" in <i>Oxford Companion to Legal Scholarship</i> (2003)	59-62

2. Dialogue Between Courts and Legislatures in the United States

Dickerson v. The United States

Kent Roach *The Supreme Court on Trial* (2001)

3. Dialogue Between Courts and Legislatures in Canada

Canadian Charter of Rights and Freedoms

Kent Roach *The Supreme Court on Trial* 53-68, 175-204

F.L. Morton "Dialogue or Monologue" *Policy Options*

Janet Hiebert "From Equality Rights to Same Sex Marriage" *ibid*

Christopher Manfredi "Same-Sex Marriage and the Notwithstanding Clause" *ibid*

F.L. Morton "Can Judicial Supremacy be Stopped" *ibid*

4. Dialogue Between Courts and Legislatures in the United Kingdom and New Zealand

New Zealand Bill of Rights

Human Rights Act, 1998 419-427

Paul Rishworth et al *The New Zealand Bill of Rights* (2003) 391-401, 416-419

Philip Plowden and Kevin Kerrigan *Advocacy and Human Rights* (2002) 431-449

Kier Starmer "Two Years of the Human Rights Act"

5. Dialogue Between Courts and Legislatures in South Africa and Conclusion

South African Constitution (extracts) 531-532

Etienne Mureinik "A Bridge to Where?" (1994) 10 S.A.J.H.R. 31

David Dyzenhaus "Law as Justification" (1998) 14 S.A.J.H.R. 11

June 11

South Africa v. Grootboom (2001) 1 SA 46 (C.C.)

Minister of Health v. Treatment Action Campaign (TAC) (2002) 5 SA 721 (C.C.)

Kent Roach Judicial Activism and Democratic Dialogue from *The Supreme Court on Trial*
(2001)

